IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1862

ADVOCATES FOR THE ARTS; GRANITE PUBLICATIONS, INCORPORATED; ROSELLEN BROWN; DOUGLAS K. MORSE; AND VERA VANCE

Petitioners

v.

MELDRIM THOMSON JR., GOVERNOR OF NEW HAMPSHIRE; JAMES HAYES, LYLE HERSOM, BERNARD STREETER, LEON YEATON, AND LOUIS D'ALLESANDRO, COUNCILORS OF NEW HAMPSHIRE

Respondents

BRIEF IN OPPOSITION TO CERTIORARI

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The opinion of the Court of Appeals for the First Circuit is reported at 532 F.2d 792. The opinion of the United States District Court for the District of New Hampshire is reported at 397 F.Supp. 1048.

JURISDICTION

Petitioners have met the time requirements of 28 U.S.C. §2101(c) and have adequately invoked 28 U.S.C. §1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes involved are 20 U.S.C. §§951 et seq., N. H. Rev. Stats. Ann. ch. 19-A, and N.H. Rev. Stats. Ann. 4:15 and 21:31-a. Involved also are the First and Fourteenth Amendments of the United States Constitution and Part 2 Articles 41, 56, 60, and 62 of the New Hampshire Constitution. The critical terms of the state statutes and of the state constitution are set out in the Appendix hereto. Petitioners' petition sets out the First and Fourteenth Amendments.

QUESTION PRESENTED

Did petitioners have a First Amendment claim to money from a discretionary state art-grant program, administered by the New Hampshire Governor and Council?

STATEMENT OF THE CASE[1]

On 15 April 1975, petitioners, individuals and nonprofit organizations, filed suit in federal district court to have the New Hampshire Governor and Council enjoined from exercising their discretion in approving grants under a state art-grant program. On motion by the Governor and Council, the district

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[1]References are made to the appendix (A.) before the court of appeals. By letter dated 23 June 1976, petitioners' counsel indicated to the Clerk of the Supreme Court that nine copies of the appendix below were being filed with the Supreme Court.

court dismissed the complaint on 18 July 1975. Petitioners appealed, and on 31 March 1976 the court of appeals affirmed the judgment below.

In 1965, Congress established the National Endowment for the Arts, which provides for, among other things, (1) direct grants from the federal government to persons engaged in art projects and productions, and (2) grants-in-aid to states in order to assist them in their support of persons engaged in art projects and productions. 20 U.S.C. §954. For a state to receive these grants-in-aid, it must have a state agency to administer the grant program. *Id.* In New Hampshire, that agency is the New Hampshire Commission on the Arts (Commission), which was established in 1965 and operates under N.H. Rev. Stats. Ann. ch. 19-A. Before 5 July 1975, N.H. Rev. Stats. Ann. ch. 19-A was silent on whether decisions by the Commission to grant money were subject to the approval of the State's chief executive body, the Governor and Council. However, by force of (1) N.H. Rev. Stats. Ann. 4:15, a statute of general applicability concerning agency expenditures, and (2) N.H. Const. Pt. 2 Art. 56, concerning disbursements from the State treasury, that approval was necessary. As of 5 July 1975, moreover, a third law—addressed specifically to the Commission—also requires that result: N.H. Rev. Stats. Ann. 19-A:6, as amended by 1975 N.H. Laws 128.

The administrative practice has followed the law. Since the Commission's creation in 1965, the unvaried practice has been that all Commission grants of more than $500 are subject to the Governor's and Council's prior approval. (A. 18.)

Granite is a journal of prose and poetry that is edited, printed, and published by Granite Publications, Incorporated (Granite), a New Hampshire nonprofit corporation. (A. 2.) In July 1972, acting on a request by Granite, the Commission voted to award it $950 to assist in the publication of *Granite*. (A. 5.) In accordance with N.H. Rev. Stats. Ann. 4:15 and N.H. Const. Pt. 2 Art. 56, and consistently with the precedent concerning Commission disbursements (see A. 18), the State's Governor and Council passed upon the Commission's decision. They approved it, and thus authorized the grant. (A. 5.) Late in 1973, Granite applied to the Commission for a second grant, this one for $1,000. (A. 6.) The Commission, though, voted to award Granite only $750. The Governor and Council then approved that decision at a session of their meeting of 1 May 1974. Immediately after that session was adjourned, however, the Governor and Council were shown a piece of writing entitled "Castrating the Cat," which had appeared in *Northern Lights*, a special edition of *Granite* at the end of 1972. "Castrating the Cat" goes as follows:

CASTRATING THE CAT

—It is better to marry than to burn —

St. Paul

you may keep both balls preserved in a jar
on the mantle piece

he will be tamer more loving
to his keepers

he will not stray after cat cunt
and his urine will not smell
should he spray the mattress

—a simple swipe of scalpel
along the scrotum
and it is done —

do not let the image of your own hulk
drawn down a bannister of razor blades
finger the inside of your sac

think of him as a tenor in the choir

—and it is done
the nurse washes her hands of him
yes she smiles we clipped his wings—

as above the errors flesh is heir to
like St. Simeon on his desert pole
unwashed in rags
who picked up each worm that fell
from his arm bid it eat and put it back

The Governor and Council read this writing and had, in petitioners' words, an "adverse reaction to it." (A. 6.) They then reconvened their meeting and rescinded their grant-approval. (A. 6.) They made absolutely no attempt or threat, however, to interfere in any way with any publication of Granite's.

Eleven and a half months later, on 15 April 1975, Granite brought this action. In the meantime, it had published at least four numbers of *Granite* (A. 17) and had sought financial assistance directly from the federal government. (A. 20-21; see also p. 17 of Granite's memorandum at the district court.) In its complaint, Granite said that the court had jurisdiction under 28 U.S.C. §1331, 28 U.S.C. §1343(3), and 42 U.S.C. §1983. (A. 2 and 8.) It said that the Governor's and Council's decision of nearly a year before was in violation of 20 U.S.C.§§951 et seq., N.H. Rev. Stats. Ann. ch. 19-A, and the First and Fourteenth Amendments. (A.5-10.) Granite did not specifically request damages, but sought preliminary and permanent injunctions restraining the Governor and Council: "from . . . interfering with the First and Fourteenth Amendment rights of any grantee . . .[of] the Commission" (A.8); "from making any determination regarding the literary or artistic merits of any project or grantee, which determination would have the effect of denying any grant awarded by the . . .Commission" (A.8); and "from exercising any discretion with respect to the artistic or literary merits or qualifications of any applicant or grantee of funds administered by the . . .Commission" (A.10). Joining Granite as petitioners were: Advocates for the Arts (Advocates), a non-profit organization whose principal place of business is New York City and whose purpose is "to form a national constituency of individuals concerned with the promotion of the arts"; Rosellen Brown, a New Hampshire resident whose writing appeared in the Granite edition that contained "Castrating the Cat"; Douglas K. Morse, a New Hampshire resident who is a member of Advocates; and Vera Vance, a New Hampshire resident whose writing appeared in the Granite edition that contained "Castrating the Cat," and who is a member of Advocates and has subscribed to *Granite*. (A. 2-3.)

The Governor and Council, asserting that the district court lacked subject-matter jurisdiction and that petitioners had

failed to state a claim on which relief could be granted, moved for dismissal.[2] (A.13.) As was indicated above, judgment was entered for the Governor and Council on 18 July 1975 and affirmed on 31 March 1976. At the court of appeals petitioners expressly waived their statutory arguments. (Petitioners' brief at court of appeals, pp. 4 and 8-16.)

ARGUMENT OPPOSING CERTIORARI[3]

I.

The Decision Does Not Conflict With Decisions Of Other Courts of Appeals.

As far as respondents can determine, this is the only court-of-appeals decision of its kind.

II.

There Is No Important Question Of Federal Law That Should Be Settled By This Court.

Freedom of speech is not even remotely in jeopardy here. Whether the magazine that published "Castrating the Cat" deserved a $750 public art subsidy more than did any of its competitors is simply not an important question of federal law.

> [P]ublic funding of the arts seeks "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge" artistic expression. *Buckley* v. *Valeo*, . . .[44 L.W. 4127] at 4154 [U.S.S.C. 30 Jan. 1976]. A disappointed grant applicant cannot complain that his work has been suppressed, but only that another's has been promoted in its stead. [*Advocates for the Arts* v. *Thomson*, 532 F.2d 792,795 (1st Cir. 1976).]

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[2]The Governor and Council asked the district court that, should it find it necessary to rely on matters asserted in the affidavits, the court then treat the motion to dismiss as a motion for summary judgment. (A.16.)

[3]Below respondents made preliminary arguments on jurisdiction, standing, and equitable relief. For purposes of brevity, respondents do not assert those arguments here, but reserve the right to assert them in a brief on the merits, should the Court grant certiorari.

But even if the normal meaning of "suppressed" were set aside and it were assumed, arguendo, that Granite could complain that its work had somehow been "suppressed," its complaint would still not state a redressable injury. For the speech in issue would be of a kind that cannot invoke the fullest measure of First Amendment protection. See, e.g., *Young* v. *American Mini Theatres*, 44 L.W. 4999 (U.S.S.C. 24 June 1976); *Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 44 L.W. 4686 (U.S.S.C. 24 May 1976) (NB n. 24 at 4693); *Close* v. *Lederle*, 424 F.2d 988, 989 (1st Cir. 1970) cert. denied 400 U.S. 903 (1970). Cf. *Hynes* v. *Mayor and Council*, 44 L.W. 4643 (U.S.S.C. 19 May 1976) (NB Brennan, J., dissenting at n. 3 and accompanying text at 4648-49).

Although in its anatomical implications the comparison might be imperfect, this Court could say about "Castrating the Cat," and Granite's poetry generally, what it has already said about "erotic materials": "[E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate that inspired Voltaire's immortal comment [on defense of speech]." *Young*, *supra* at 5005.

In the instant case we have not only lesser-protected speech, but lesser-protected speech that has not even been suppressed. Petitioners' First Amendment argument, therefore, is as impotent as their celebrated cat.

III.

The Decision Is Correct And Does Not Conflict With Applicable Decisions Of This Court.

In *Freedman* v. *Maryland*, 380 U.S. 51 (1965), Mr. Justice Douglas said in his concurring opinion, "I do not believe that any form of censorship . . . is permissible." *Id.* at 61-62. The same champion of freedom of expression, however, also recognized that the First Amendment does not force subsidies for expression. He spoke to this point in his concurring opinion in *Cammarano* v. *United States*, 358 U.S. 498 (1959), in which the Supreme Court unanimously rejected a First Amendment challenge to the denial of a tax deduction that had been claimed for

costs of political advertising. Mr. Justice Douglas said at 515:

> To hold that this item of expense must be allowed as a deduction would be to give impetus to the view favored in some quarters that First Amendment rights are somehow not fully realized unless they are subsidized by the State. Such a notion runs counter to our decisions . . ., and may indeed conflict with the underlying premise that a complete hands off policy on the part of government is at times the only course consistent with First Amendment rights.

Cf. *P.A.M. News Corporation* v. *Butz*, 514 F.2d 272 (D.C. Cir. 1975).

Petitioners rely on *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975), where the Court held that Chattanooga municipal officials had improperly denied the producers of "Hair" the use of a municipal theatre. For three reasons the reliance is misplaced. First, petitioners lump together what logic would keep separate: speaking and money. In the simplest possible terms, *Southeastern* is a speaking case whereas *Advocates* is a money case. Granted, this may be an oversimplification (see *Buckley*, *supra*); yet it serves to illuminate a difference that petitioners would obscure.

In *Southeastern*, the complained-of injury was not economic. The "Hair" producers were not seeking the cushion of a public subsidy. They were seeking the use of a public forum. Contrast the case at bar: no public forum was sought by, or denied to, Granite; nor was Granite denied access to the public through the medium of print. The State has left Granite alone to speak and write what it wants. And, more—by keeping copies of Granite's publications at the State Library (A.17)—the State has actually helped Granite communicate its ideas to the public. All that has been denied to Granite is public money. But a denial of public money—as distinguished from a restriction on certain expenditures of private money—simply does not trench on one's freedom to speak. See *Buckley*, *supra*.

The second reason that *Southeastern* is inapposite is that it evidently did not involve any competition for the use of the public forum. 420 U.S. at 555. For the receipt of New Hampshire art grants, however, there emphatically is competition. It is a case of too many persons—to say nothing of cats—chasing too few dollars. The very nature of the art-grant program calls for the Governor and Council to choose among competitors.

Here the Governor and Council did their job: they chose. And Granite lost. That result, however, neither violates the First Amendment nor requires the attention of the nation's highest court.

Third, the remedy called for in *Southeastern* tells just how radically different the problem there was from the problem here. The Court said in *Southeastern*:

> "...[B]ecause only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." [*Freedman* v. *Maryland*,] 380 U.S. [51] at 58. We held in Freedman, and we reaffirm here, that a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: *First*, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured. [420 U.S. at 559-60.]

If applied here, the *Southeastern* remedy would: (1) give the judiciary the executive function of granting and denying art awards; (2) require the executive to take to court every application for an art award; (3) require the executive to prove that the material in question is "unprotected," even though he might concede that it is "protected," but nevertheless bad art; (4) arguably require the executive to make a conditional grant pending resolution of the matter in court; and (5) clot court dockets with art-grant problems, whose subject matter might range from castrated cats to fertile ferns. The absurdity of this conclusion says much about its premise: *Advocates*, unlike *Southeastern*, is not a case of prior restraint.

Petitioners also rely on *Perry* v. *Sinderman*, 408 U.S. 593 (1972), where a government employer disapproved of expressions by a government employee, and thereupon denied him renewal of his employment contract—denied him a government "benefit." This Court held that the employer's action violated the First Amendment. But in *Perry* the expressions disapproved of had nothing to do with the employee's qualifications for the desired job; i.e., the expressions were *not intrinsic* to the benefit sought. And it is on this point that the case at bar differs. In a discretionary art-grant program, the grant-applicant's expressions within the object for which it seeks a grant have *everything* to do with its qualifications for the grant; its expressions there *are intrinsic* to the benefit sought. The very essence of a discretionary art-grant program is to reward some expressions and to withhold rewards from others; it requires judgments to be made on expressions. And the only fair determinant for whether an award should be granted is how the applicant has expressed itself within the object for which it seeks an award. That was the determinant in the case at bar. And the result did nothing more than illustrate the converse of Mr. Justice Harlan's proposition in *Cohen* v. *California*, 403 U.S. 15, 25 (1971): often, one man's lyric is another's vulgarity.

This Court has denied certiorari in cases somewhat analogous to *Advocates*. In *Presidents Council, District 25* v. *Community School Board No. 25*, 457 F.2d 289 (2d Cir. 1972) cert. denied 409 U.S. 998 (1972), the defendant school board removed a book (*Down These Mean Streets* by Piri Thomas) from the libraries of all junior high schools in the public school district. The plaintiff—an organization of junior high school students in the district, parents of such students, and officials of parent-teacher associations in the district—claimed a violation of the First Amendment, and sued for declaratory and injunctive relief. Affirming the dismissal below, the court of appeals said at 291-92:

> Since we are dealing not with the collection of a public book store but with the library of a junior high school, evidently some authorized person or body has to make a determination as to what the library collection will be. It is predictable that no matter what choice of books may be made by whatever segment of academe, some other person or group may well dissent. The ensuing shouts of book burning, witch hunting and violation of academic freedom hardly elevate this intramural strife to first amendment constitutional proportions. If it did, there would be a constant intrusion of the judiciary into the internal affairs of the school. Academic freedom is scarcely fostered by the intrusion of three or even nine federal jurists making curriculum or library choices for the community of scholars ....

And at 293, the court said:

> The administration of any library . . . involves a constant process of selection and winnowing based not only on educational needs but financial and architectural realities. To suggest that the shelving or unshelving of books presents a constitutional issue, particularly where there is no showing of a curtailment of freedom of speech or thought, is a proposition we cannot accept.

See also *Minarcini* v. *Strongville City School District*, 384 F. Supp. 698 (N.D. Ohio 1974). If the school board's book-removing in *Presidents Council* did not violate the First Amendment, then a fortiori the Governor's and Council's denial of an art award here did not violate the First Amendment. The Governor and Council merely denied Granite a gratuity; they did not deny Granite's magazine a place in a publicly supported library; or, said in a way that implicates the First Amendment, they did not deny the magazine a place in a public "reading forum." Indeed, as has already been indicated, *Granite* remains in the New Hampshire State Library. (A. 17.)

In *Avins* v. *Rutgers, State University of New Jersey*, 385 F.2d 151 (3d Cir. 1967) cert. denied 390 U.S. 920 (1968), the editors of the law review of a state-supported university refused to publish an article by the plaintiff. The plaintiff, invoking the First Amendment, sued for declaratory and injunctive relief. Affirming the district court's summary judgment against the plaintiff, the court of appeals said at 153-54:

> . . . [No] one doubts that . . . [the plaintiff] may freely at his own expense print his article and distribute it to all who wish to read it. However, he did not have the right, constitutional or otherwise, to commandeer the press and columns of the Rutgers Law Review for the publication of his article, at the expense of the subscribers to the Review and the New Jersey taxpayers, to the exclusion of other articles deemed by the editors to be more suitable for publication. On the contrary, the acceptance or rejection of articles submitted for publication in a law school law review necessarily involves the exercise of editorial judgment and this is in no wise lessened by the fact that the law review is supported, at least in part, by the State.
>
> The plaintiff's contention that the student editors of the Rutgers Law Review have been so indoctrinated in a liberal ideology by the faculty of the law school as to be unable to evaluate his article objectively is so frivolous as to require no discussion.

The Governor and Council in the instant case are the analogue of the law review editors in *Avins*: just as the editors had, and have, lawful authority to judge what is "suitable for publication" in the law review, so too the Governor and Council had, and have, lawful authority to judge what is suitable for subsidization under the art-grant program; and just as the editors' judgment did not infringe Mr. Avins's First Amendment rights, so too the Governor's and Council's judgment did not infringe Granite's.

In *Associated Students of Western Kentucky University* v. *Downing*, 475 F.2d 1132 (6th Cir. 1973) cert. denied 414 U.S. 873 (1973), the defendant university president and board of regents cancelled a filmbooking contract, under which a movie involving nudity was to have been shown on campus. The contract had been entered into earlier as part of a cultural program financed under the university budget. Claiming that the cancellation violated the constitutional rights of its members, the plaintiff student organization sued for declaratory and injunctive relief. It was denied relief at both the district court and the court of appeals. The Sixth Circuit concluded, "In the present case the University did nothing more than to make a determination that, with respect to a particular experimental film, it would be 'inappropriate for the University to continue as a contracting party.' " 475 F.2d at 1134. Nothing the Governor and Council did in the instant case is any more extreme.

CONCLUSION

For the foregoing reasons, the Court should deny certiorari.

Respectfully submitted,

For Respondents

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21 July 1976

APPENDIX

Before 5 July 1975, N.H. Rev. Stats. Ann. 19-A:6 provided as follows:

> Powers. The commission is hereby authorized and empowered to hold public or private hearings; to accept gifts, contributions and bequests of unrestricted funds from individuals, foundations, corporations and other organizations or institutions for the purpose of furthering the educational objectives of the commission's programs; to make and sign any agreements and to do and perform any acts that may be necessary, desirable or proper to carry out the purposes of this act. The commission may request and shall receive from any department, division, board, bureau, commission or other agency of the state such assistance and data as will enable it properly to carry out its powers and duties hereunder.

As of 5 July 1975, N.H. Rev. Stats. Ann. 19-A:6 was amended, by 1975 Laws 128:1, to provide as follows:

Powers. The commission is hereby authorized and empowered to:

I. Hold public or private hearings;

II. Accept gifts, contributions and bequests of unrestricted funds from individuals, foundations, corporations and other organizations or institutions for the purpose of furthering the educational objectives of the commission's programs;

III. Make and sign any agreements and to do and perform any acts that may be necessary, desirable or proper to carry out the purposes of this chapter;

IV. Request and shall receive from any department, division, board, bureau, commission or other agency of the state such assistance and data as will enable it properly to carry out its powers and duties hereunder;

V. *Receive funds provided by the National Endowment for the Arts under the National Foundation on the Arts and the Humanities Act of 1965*, and under such additional federal legislation and state appropriations as may be enacted;

VI. *Allocate and disburse said funds by entering into*

contracts and agreements with any department, agency or subdivision of federal, state, county or municipal government or *any individual, foundation, corporation, association or public authority in order to carry out the purposes of this chapter, subject to approval by the governor and council*;

VII. Employ such persons in accordance with the rules of the department of personnel as may be necessary within the commission's appropriation, to enable and assist it to perform the duties, exercise the powers and make the reports required by this chapter. [Emphasis added.]

N.H. Rev. Stats. Ann. 4:15 provides in relevant part:

> Department Expenditures. The expenditure of any moneys appropriated or otherwise provided to carry on the work of any department of the state government shall be subject to the approval of the governor, with the advice of the council, under such general regulations as the governor and council may prescribe with reference to all or any of such departments, for the purpose of securing the prudent and economical expenditures of the moneys appropriated . . . .

The Commission derives money from the State's general fund and from the federal government. The federally derived funds are, of course, appropriated by Congress. But they are "appropriated" a second time by the New Hampshire Legislature. The Legislature acts as a budgetary conduit for the funds between the federal government and the state agency; and it uses the verb "appropriate" to describe how it treats those funds. See, e.g., 1973 N.H. Laws 376:49.

N.H. Rev. Stats. Ann. 21:31-a provides as follows:

> Governor and Council. The phrase "governor and council" shall mean the governor with the advice and consent of the council.

N.H. Const. Pt. 2 Art. 41 provides as follows:

> [Governor; Supreme Executive Magistrate.] There shall be a supreme executive magistrate, who shall be styled the Governor of the State of New Hampshire, and

whose title shall be His Excellency. The executive power of the state is vested in the governor. The governor shall be responsible for the faithful execution of the laws. He may, by appropriate court action or proceeding brought in the name of the state, enforce compliance with any constitutional or legislative mandate, or restrain violation of any constitutional or legislative power, duty, or right, by any officer, department or agency of the state. This authority shall not be construed to authorize any action or proceedings against the legislative or judicial branches.

N.H. Const. Pt. 2 Art. 56 provides as follows:

[Disbursements from Treasury.] No moneys shall be issued out of the treasury of this state, and disposed of, (except such sums as may be appropriated for the redemption of bills of credit, or treasurer's notes, or for the payment of interest arising thereon) but by warrant under the hand of the governor for the time being, by and with the advice and consent of the council, for the necessary support and defense of this state, and for the necessary protection and preservation of the inhabitants thereof, agreeably to the acts and resolves of the general court.

N.H. Const. Pt. 2 Art. 60 provides as follows:

[Councilors; Mode of Election, etc.] There shall be biennially elected, by ballot, five councilors, for advising the governor in the executive part of government. The freeholders and other inhabitants in each county, qualified to vote for senators, shall some time in the month of November, give in their votes for one councilor; which votes shall be received, sorted, counted, certified, and returned to the secretary's office, in the same manner as the votes for senators, to be by the secretary laid before the senate and house of representatives on the first Wednesday of January.

N.H. Const. Pt. 2 Art. 62 provides as follows:

[Subsequent Vacancies; Governor to Convene; Duties.] If any person thus chosen a councilor, shall be elected governor or member of either branch of the legisla-

ture, and shall accept the trust; or if any person elected a councilor, shall refuse to accept the office, or in case of the death, resignation, or removal of any councilor out of the state, the governor may issue a precept for the election of a new councilor in that county where such vacancy shall happen and the choice shall be in the same manner as before directed. And the governor shall have full power and authority to convene the council, from time to time, at his discretion; and, with them, or the majority of them, may and shall, from time to time hold a council, for ordering and directing the affairs of the state, according to the laws of the land.